

Report of the European Parliament on the Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (15 May 2013)

Caption: In this report of 15 May 2013, the European Parliament delivers its opinion on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic.

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REPORT

on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union)
(00091/2011 – C7-0385/2011 – 2011/0817(NLE))

Committee on Constitutional Affairs

Rapporteur: Andrew Duff

PR_NLE-AP

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE))

The European Parliament,

- having regard to the letter from the Czech Government to the Council of 5 September 2011 on a draft protocol on the application of the Charter of Fundamental Rights of the European Union ('the Charter') to the Czech Republic,
- having regard to the letter from the President of the European Council to the President of the European Parliament of 25 October 2011, concerning a draft protocol on the application of the Charter to the Czech Republic,
- having regard to the first subparagraph of Article 48(3) of the Treaty on European Union (TEU), pursuant to which the European Council consulted Parliament (C7-0385/2011),
- having regard to Article 6(1) TEU and to the Charter,
- having regard to Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the TEU and to the Treaty on the Functioning of the European Union,
- having regard to the conclusions of the meeting on 29 to 30 October 2009 of the Heads of State or Government of the Member States, meeting within the European Council,
- having regard to the declarations concerning the Charter, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, in particular, Declaration No 1 by all the Member States, Declaration No 53 by the Czech Republic and Declarations No 61 and No 62 by the Republic of Poland,
- having regard to Resolution 330, adopted at the 12th Sitting of the Senate of the Parliament of the Czech Republic on 6 October 2011,
- having regard to Rule 74a of its Rules of Procedure,
- having regard to the report of the Committee on Constitutional Affairs (A7-0174/2013),

Whereas:

- A. The Heads of State or Government, meeting within the European Council on 29 to 30 October 2009, agreed that they would, at the time of the conclusion of the next accession treaty and in accordance with their respective constitutional requirements, attach to the Treaties a Protocol concerning the application of the Charter to the Czech Republic.
- B. On 5 September 2011 the Czech Government, in a letter from its Permanent Representative, submitted to the Council a proposal, in accordance with Article 48(2)

TEU, for the amendment of the Treaties to add a Protocol concerning the application of the Charter to the Czech Republic.

- C. On 11 October 2011 the Council submitted to the European Council, in accordance with Article 48(2) TEU, a proposal for the amendment of the Treaties concerning the addition of a Protocol on the application of the Charter to the Czech Republic.
- D. In accordance with the first subparagraph of Article 48(3) TEU, the European Council has consulted Parliament as to whether the proposed amendments should be examined.
- E. Pursuant to Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter as having the same legal value and binding force as the Treaties.
- F. The Protocols form an integral part of the Treaties to which they are attached, and therefore an additional Protocol establishing special rules with regard to the application of parts of the law of the Union to a Member State requires a revision of the Treaties.
- G. According to the second subparagraph of Article 6(1) TEU, the Charter does not extend in any way the competences of the Union as defined in the Treaties.
- H. According to Article 51 thereof, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. Those institutions, bodies, offices and agencies must therefore respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers and respecting the limits of the powers conferred on the Union by the Treaties. As confirmed by Declaration No 1 by the Member States, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.
- I. Paragraph 2 of Declaration No 53 by the Czech Republic provides that the Charter "does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field", thereby establishing that the integrity of the legal order of the Czech Republic is guaranteed without recourse to an additional instrument.
- J. On the basis of academic evidence and case-law, Protocol No 30 does not exempt Poland and the United Kingdom from the binding provisions of the Charter, it is not an 'opt-out', it does not amend the Charter and it does not alter the legal position which would prevail if it were not to exist¹. The only effect it has is to create legal uncertainty not only in Poland and the United Kingdom but also in other Member States.
- K. An important function of the Charter is to increase the prominence of fundamental rights and to make them more visible, but Protocol No 30 gives rise to legal uncertainty and political confusion, thereby undermining the efforts of the Union to reach and maintain a uniformly high and equal level of rights protection.

¹ Judgment of the Court of Justice of 21 December 2011 in Joined Cases C-411/10 and C-493/10, especially paragraph 120.

- L. If Protocol No 30 were ever to be interpreted as limiting the scope or force of the provisions of the Charter, the effect would be to diminish the protection of fundamental rights and freedoms afforded to people in Poland, in the United Kingdom and, prospectively, in the Czech Republic,
- M. The Czech Parliament ratified the Treaty of Lisbon precisely as it had been signed, without any reservation or qualification whatsoever concerning full adherence by the Czech Republic to the Charter².
- N. The Czech Senate, in its Resolution 330 of 6 October 2011, opposed the application to the Czech Republic of Protocol No 30 on the ground that it would lower standards of protection of fundamental rights and freedoms afforded to Czech citizens. The Czech Senate also questioned the – ambiguous – constitutional circumstances in which the matter was first raised by the President of the Republic only after the parliamentary ratification of the Treaty of Lisbon had been completed.
- O. The Czech Constitutional Court dismissed two petitions in 2008 and 2009, finding the Treaty of Lisbon to be fully in accordance with Czech constitutional law, but the possibility cannot be ruled out that a petition against the proposed amendment of the Treaties will be lodged at the same Court.
- P. Parliament, in a spirit of sincere cooperation, is duty bound to give its opinion to the European Council on all Treaty changes that are proposed, irrespective of their significance, but it is in no way bound to agree with the European Council.
- Q. Doubts persist as to the willingness of the Czech Parliament to complete the ratification of the new protocol aimed at extending the application of Protocol No 30 to the Czech Republic; in the event that the European Council decides to examine the proposed amendment, other Member States might wish not to start their ratification procedures until the Czech Republic has completed its own,
 - 1. Acknowledges its consultation by the European Council on the examination of the proposed amendment of the Treaties;
 - 2. Instructs its President to forward this resolution as its position to the European Council, the Council, the Commission, the government and parliament of the Czech Republic and the parliaments of the other Member States.

² The Czech Chamber of Deputies ratified the Treaty of Lisbon on 18 February 2009 and the Czech Senate on 9 May 2009.

EXPLANATORY STATEMENT

1. The government of the Czech Republic seeks to join its state to Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.
2. In order to understand the meaning of the Czech initiative, it is necessary to examine the nature and effect of the British and Polish Protocol since the coming into force of the Treaty of Lisbon on 1 December 2009. There has been some academic commentary on this Protocol which your rapporteur has studied.³ He has also consulted lawyers eminent in this field.

There was little relevant case law until the Court of Appeal (England and Wales) made a reference for a preliminary ruling to the European Court of Justice (ECJ) on the relevance of the Protocol to an asylum case.⁴ The Home Secretary had earlier sought to maintain before the High Court of Justice (England & Wales) (Administrative Court) that, because of Protocol No 30, the provisions of the Charter did not apply to the UK. One of the questions referred to the ECJ was whether the existence of Protocol No 30 qualified in any respect the obligations of the UK. The High Court inclined towards the view that Protocol No 30 could be construed as a general opt-out from the Charter, assuming that the Charter does not have direct effect in the UK.

In the Court of Appeal, however, the representative of the UK government argued helpfully that the purpose of the Protocol is "not to prevent the Charter from applying to the UK, but to explain its effect". The Opinion of Advocate-General Trstenjak was delivered on 22 September 2011. She concluded that the Protocol is not an opt-out, but, instead, it makes clear that the Charter does not shift powers at the expense of the UK or Poland.

The Grand Chamber of the European Court of Justice delivered its judgment on the matter on 21 December 2011.⁵ This is an important case with respect to the meaning and application of asylum legislation, with relevance to the relationship between EU law, the Charter, the European Convention on Human Rights and the international law conventions.

In its judgment the Court upholds the Opinion of Advocate General Trstenjak. It says that:

"... Article 1(1) of Protocol No 30 explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the

³ 1. Patrick Layden QC and Tobias Lock, *Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions: UK National Report*, FIDE XXV Congress, September 2011.

2. *NS v. Secretary of State for the Home Department*. Steve J. Peers, *EU Justice and Home Affairs Law*, OUP, 2011.

3. Catherine Barnard, *The EU Charter of Fundamental Rights: Happy 10th Birthday?* in *European Union Studies Association Review*, vol 24, no 1, winter 2011.

4. Colin Turpin & Adam Tomkins, *British Government and the Constitution*, 7th ed., CUP, 2011.

⁴ Case C-411/10, *NS v Secretary of State for the Home Department*.

⁵ Joined Cases C-411/10 and C-493/10.

United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.” (paragraph 120)

The Court concluded therefore that its rulings on the substantive issues of asylum law “do not require to be qualified in any respect so as to take account of Protocol No 30”.

3. It is worth recalling that all three states most relevant to this discussion approached the matter of the Charter from different directions. The UK sought to limit the possibility that the Charter would give the EU new cause to legislate in areas, notably labour law, which would breach its infamous 'red lines'. The then prime minister told the House of Commons: "It is absolutely clear that we have an opt-out from both the Charter and judicial and home affairs".⁶
4. Poland, on the other hand, was keen to stop the Charter from curbing its own right to legislate in matters of public morality, family law, abortion, gay rights etc.⁷ Bizarrely, Poland also sought to emphasise, in adopting the British Protocol which was defensive against social rights as laid down in Title IV, that it (unlike the UK) "fully respects social and labour rights" in the spirit of the Solidarity movement⁸. Subsequent to the entry into force of Lisbon, the Protocol appears to have been completely disregarded by the Polish judiciary.⁹ A constitutional mechanism has been devised whereby Poland could decide to amend or to withdraw from the Protocol. The possibility of withdrawal is now a matter of political debate in Poland.
5. The Czech Republic, at the behest of its President, took the more eurosceptic stance. It achieved at the time of the Lisbon negotiations, its own categorical Declaration 53 which speaks of its concerns about the impact of the Charter on the principles of subsidiarity, conferral of competences, respect for national constitutions and international agreements.

The official grounds on which Mr Klaus insisted that the Czech Republic should join the Protocol was an apparent sudden concern about the impact of the Charter on the validity of the Benes Decrees that dealt with the expropriation of the property and deportation of ethnic Germans from Czechoslovakia after the Second World War.¹⁰ Nevertheless, such concerns were absent from the political debate until early 2009 and were not mentioned in submissions to the Czech constitutional court in either of its two Lisbon judgments.¹¹

Indeed, in the then government's official mandate for the negotiation of the Lisbon treaty it was a priority to establish a uniform standard of protection of human rights. Moreover,

⁶ Tony Blair to the House of Commons on 25 June 2007. He went on: "[I]n respect of the two areas that people worried about most—the Charter of Fundamental Rights, on which people said, “Well, that is going to apply in British law”, and judicial and home affairs—we have opt-outs. That is what is different. With the greatest respect, it is important that people actually pay some attention to the facts when mounting their argument". No wonder there is confusion.

⁷ Indeed, Poland obtained a Declaration 61 to that effect.

⁸ Declaration 62.

⁹ Jan Barcz, ed., *Fundamental Rights Protection in the European Union*, Wydawnictwo C.H. Beck, Warsaw, 2009.

¹⁰ Helena Bončková, Hubert Smekal, *Fragmentace společných hodnot? Výjimky z Listiny základních práv Evropské unie /Fragmentalization of Common Values? Opt-outs from the Charter of Fundamental Rights of the European Union*, in *Soucasna Evropa* 02, 2010.

¹¹ Ústavní soud - 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I; Ústavní soud - 2009/11/03 - Pl. ÚS 29/09: Treaty of Lisbon II.

all Czech political parties emphasise their attachments to social rights. And none now maintains the claim that the Benes Decrees give rise to continuing legal doubt in terms of Czech, EU or international law. Since the entry into force of Lisbon, there has been no relevant Czech case law on the matter of the application of the EU Charter.

The Czech government presses its application to adopt the terms of Protocol No 30 solely on the grounds that the European Council has promised to accept its application and that for the EU leaders to break their promise would rebound badly in Czech public opinion. There is a further, though less publicised worry that the Czech Republic would look unreliable if it now dropped its earlier application. (Your rapporteur believes, on the contrary, that if the Czechs withdrew their demand to change the Treaty there would be widespread relief among its partners.)

One should be aware, moreover, that if the Czech government presses its case to change the Treaty, it is far from certain that the Czech Parliament will ultimately ratify the new Protocol. Ratification of an international treaty which transfers competence *in any direction* probably requires a three-fifths majority in both Senate and Chamber of Deputies.¹²

Finally, we need to consider the two judgments of the Czech Constitutional Court (2008 and 2009) in which they affirm that Lisbon is fully in accord with the Czech constitution. It follows that any partial derogation from Lisbon – which is now predicated by the Protocol initiative – is highly likely to trigger a new petition or petitions in the Constitutional Court. (Such petitions may be brought by 41 Deputies, 17 Senators and, indeed, the President of the Republic himself.¹³)

One notes the letter from the Czech trade unions (CMKOS) to the President of the European Parliament setting out their objections to the draft protocol.¹⁴

The European Association for the Defence of Human Rights and the Czech Helsinki Committee have also called for the draft protocol to be dropped.¹⁵

6. In the light of the available evidence, your rapporteur makes the following analysis.
 - (a) **Preamble:** The eighth recital of the Preamble establishes that the purpose of the Protocol is to "clarify certain aspects of the application of the Charter". The seventh and twelfth recitals make it clear that, regardless of the Protocol, all other EU law applies fully to Poland and the UK. The Protocol is only relevant, therefore, if the Charter were to add to the existing general principles of EU law, or be wider in scope, or to reduce the limitations on rights in comparison to the general principles. According to A-G Trstenjak, now supported by the whole Court, the Preamble reaffirms the "fundamental validity" of the Charter.
 - (b) **Field of application:** Article 1(1) supplements Article 51(2) of the Charter. Its

¹² Article 39, Constitution of the Czech Republic.

¹³ Articles 10a & 87(1)(a) of the Constitution of the Czech Republic and §64 of the Constitutional Court Act, 182/1993 of 16th June 1993.

¹⁴ Letter from Jaroslav Zavadil, President of the Czech-Moravian Confederation of Trade Unions, to President Martin Schulz, 15 February 2012.

¹⁵ www.aedh.eu

intention is not to *extend* the ability of the courts to find that UK law is inconsistent with the Charter. However, neither does it seek to *curtail* the ability of the courts to assert a fundamental rights jurisdiction by reference to the provisions of the Charter. And in any case the courts must abide by fundamental rights as prescribed in the ECHR and as part of the general principles of EU law under the provisions of Article 6 TEU. The general principles enjoy constitutional status and may be relied upon by individuals in the courts. In this regard, people in Poland and the UK would seem to be in exactly the same position as people in all other EU states.

- (c) Scope: The principles in Title IV are required to have become the subject of national legislation before they become justiciable. Article 1(2) confirms Article 51(1) of the Charter that the Charter does not create justiciable rights as between private individuals. It also attempts to clarify Article 52(1) of the Charter, and may have been conceived as an attempt to blunt the direct effect of the Charter. Advocate-General Trstenjak says that Article 1(2) "appears to rule out new EU rights and entitlements being derived" from Title IV "on which those entitled could rely against the UK or against Poland". Yet it remains unclear which articles of Title IV would be regarded by the Court of Justice as having direct effect. And wherever Poland and the UK have provided for such rights in national law, there is no prohibition of justiciability on behalf of the ECJ. Moreover, as noted above, to the extent that Title IV represents general principles of EU law, the courts in Poland and the UK are bound to apply its provisions directly.
- (d) Interpretation: Here, Article 2 of the Protocol seeks to clarify Article 52(4) and (6) of the Charter. Where the Charter refers to national laws and practices, it refers specifically, in relation to Poland and the UK, to Polish and British laws and practices, respectively. (It could hardly be otherwise.)
7. In conclusion, Protocol No 30 does not exempt the UK and Poland from the binding provisions of the Charter. It is not an 'opt-out'. It does not amend the Charter. At face value, the Protocol would seem not to alter the legal position which would prevail if it were not to exist. Yet the very existence of the Protocol has given rise to legal uncertainty and political confusion. In that respect, it affects adversely all member states and not just the UK, Poland or, prospectively, the Czech Republic.¹⁶

What is perfectly clear, moreover, is that were Protocol No 30 ever to be interpreted as having the effect of limiting the scope or force of the Charter's provisions, the result would be to lower the protection of fundamental rights afforded to people in Poland and the UK, and would therefore undermine the efforts of the EU to reach and maintain a uniformly high level of protection.

¹⁶ Declaration 1 bears witness to the need to achieve a common and equal understanding of the effect of the Charter on all Member States.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	19.2.2013
Result of final vote	+: 17 -: 4 0: 0
Members present for the final vote	Alfredo Antoniozzi, Andrew Henry William Brons, Carlo Casini, Andrew Duff, Ashley Fox, Roberto Gualtieri, Enrique Guerrero Salom, Zita Gurmai, Gerald Häfner, Constance Le Grip, Morten Messerschmidt, Paulo Rangel, Algirdas Saudargas, Indrek Tarand, Rafał Trzaskowski, Luis Yáñez-Barnuevo García
Substitute(s) present for the final vote	Elmar Brok, Zuzana Brzobohatá, Andrea Češková, Sylvie Guillaume, Anneli Jäätteenmäki, Vital Moreira, Evelyn Regner, Helmut Scholz, György Schöpflin, Alexandra Thein